No. 84-233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,

Petitioner,

v.

IRL SHUTTS, et al.,

Respondents.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF OF AMICUS CURIAE THE CONSUMER COALITION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Amicus, the Consumer Coalition, is an Illinois not-for-profit corporation, organized for the advancement of the rights of consumers in the courts and in the marketplace. The Consumer Coalition was Amicus when the issue of the multi-state class action was last raised in this Court in *Miner v. The Gillette Company*, 87 Ill. 2d 7, 428 N.E. 2d 478 (1981), *cert. granted*, 456 U.S. 914, *cert. dismissed*,

459 U.S. 86 (1982). Amicus believes that the imposition of the "minimum contacts" test to state court class actions would deprive the state courts of the continued ability to conduct national class actions without which national groups of consumers would be unable to obtain redress in disputes with multi-state enterprises.*

SUMMARY OF THE ARGUMENT

The contention of Phillips Petroleum Company ("Phillips") and its supporting Amici that multi-state class actions must comply with the "minimum contacts" test for personal jurisdiction is a radical departure from the precedent of this Court and the practice of the lower courts. Since the beginning of this century, the state and federal courts have adjudicated multi-state class actions without applying the jurisdictional tests employed in individual actions. Multi-state class actions are the only procedure known to our judicial system for resolving issues between large numbers of widely spread class members and multi-state enterprises. Such enterprises generally establish presences in numerous states. Class members conduct business with multi-state enterprises in the states of their residences and will not have minimum contacts with any one forum. Thus, the "minimum contacts" test would require fifty separate adjudications to complete, for example, one state insurance reorganization for a nationwide insurer or one trustee's accounting for a multi-state trustee or one nationwide consumer dispute. Simultaneous

* The consents of Petitioner and Respondent to the filing of this brief have been filed with the Clerk of this Court.

state court class actions have never been employed to complete the resolution of any of these multi-state disputes. Any such requirement would only prevent the state system from conducting adjudications essential to the states and to the country.

Rather than protecting class members' due process rights, the "minimum contacts" test would serve to deprive them of the opportunity to have their claims adjudicated. The "minimum contacts" test is intended to protect persons from being "haled" before foreign courts. Class actions are conducted with the participation only of the representative class members and are intended to fully and fairly adjudicate the rights of the body of the class without bringing them before the court. Thus, multi-state class actions do not require that class members be "haled" before a foreign court.

The hypothetical problems asserted by Phillips and its Amici are no reason to eliminate a procedure so essential to the administration of the state system of justice as the multi-state class action. To the extent that any of the problems suggested by Phillips are real rather than hypothetical they should be solved on a case by case basis with solutions addressed to the specific problems. Phillips' problems require neither the application of the "minimum contacts" test to non-resident class members nor the destruction of the multi-state class action which would result.

Finally, the lower court opinion contains broad language regarding the requirement of individually mailed notice to all identifiable class members at the outset of the litigation. The time and manner of notice required by the Constitution in class actions is not raised by the petition and has not been briefed by the parties. It is of enormous gravity and should not be addressed by the Court in the instant case.

ARGUMENT

I.

THIS COURT SHOULD NOT EXPAND THE APPLICATION OF THE MINIMUM CONTACTS TEST OF PERSONAL JURISDICTION IN INDIVIDUAL ACTIONS TO NON-RESIDENT CLASS MEMBERS IN STATE COURT CLASS ACTIONS.

A. Phillips Seeks A Radical Change In The Law.

Phillips' contention here is that no plaintiff class may include absent class members unless those class members satisfy the "minimum contacts" test for jurisdiction over litigants in individual actions and primarily for jurisdiction over defendants. Phillips' claim is contrary to the great body of the law which has existed in this country for many years and the destructive effect on the administration of justice which would result from its grant demands its rejection.

Class actions are simply "a different animal" from individual actions in which all of the parties personally participate in the court proceeding. Since the latter part of the 19th Century, see, e.g., *Smith v. Swormstedt*, 57 U.S. 288 (1853), the courts have been conducting multi-state class actions without applying the jurisdictional principles applicable to individual actions. Some of the reported cases contain explicit discussion of the jurisdictional issue and some do not, but all are premised on the long-standing rule that class actions are not governed by the jurisdictional rules applicable to individual cases. Because the number of such cases makes it impractical to cite them all in the body of this brief a sampling of multi-state class actions conducted without the limitations of normal jurisdictional principles is set forth in Appendix A. Multi-state

class actions exist only because the courts have consistently refused to subject absent class members to the jurisdictional rules applicable in individual cases. This Court, in particular has never required class actions to meet the jurisdictional requirement imposed on individual actions and has rejected time and again the very principle that Phillips here espouses. In 1877 this Court established the principle that due process imposed territorial limits on a forum court in adjudicating an individual action. *Pennoyer v. Neff*, 95 U.S. 714 (1877). Under *Pennoyer*, a court could exercise personal jurisdiction over a defendant only if the defendant were "present" within the territorial limits of the forum state. Subsequently, in *Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662 (1915), this Court upheld a state court class action judgment against the collateral attack of a non-resident who argued against the application of "full faith and credit". Despite the assertion of *Pennoyer* by the non-resident, this Court did not even discuss *Pennoyer*'s jurisdictional requirements. In upholding jurisdiction this Court instead relied on three elements. First, the case involved a representative or class action. "A court of equity permits a portion of the parties in interest to represent the entire body and the decree binds all . . . as if all were before the court." *Id.*, at 672. Second, the defendant insurance company was subject to the jurisdiction of the court which rendered the judgment. Third, if the state court had not determined the rights of the entire class and the litigation were fragmented before the courts of various states, it would have exposed the litigants to conflicting duties and obligations. "It would have been destructive of their mutual rights . . . to use the . . . fund in one way as to claims of members residing in one state and to use it in another way as to claims of members residing in a different state." *Id.* at 670-671.

This Court also reaffirmed the non-applicability of the jurisdictional principles of individual law suits to class actions in collateral suits by non-resident plaintiffs who sought to avoid full faith and credit by urging the application of *Pennoyer*, and did so without discussing the jurisdictional requirements of *Pennoyer*, in *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531 (1915); *Hartford Life Insurance Co. v. Barber*, 245 U.S. 146 (1917); *Sovereign Camp of the Woodmen of the World v. William F. Bolin*, 305 U.S. 66 (1938). Subsequently, in *Hansberry v. Lee*, 311 U.S. 32 (1940), this Court reviewed its prior holdings and said that class suits were appropriate where some of the class members were ". . . not within the [normal] jurisdiction . . ." of the court. *Id.*, at 41. And in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), a suit to settle the accounts of a trustee, this Court again rejected a contention that a state court could not determine the rights of absent class members because they resided beyond its normal territorial jurisdiction. Again, the Court focused on the fact that there is a need to completely determine the rights of all absent class members in one lawsuit and again rejected *Pennoyer*'s tests of jurisdiction.*

* Despite arguments on collateral attack that *Pennoyer* prevented jurisdiction, none of the Supreme Court cases even investigate whether jurisdiction could be based on the *Pennoyer* requirements. Although some of these cases mention a common fund, this was not and has never been a basis of jurisdiction. In all of these cases the class action determined personal rights, not possible under *in rem*, and in none of them did this Court discuss *in rem* jurisdiction. Thus, class actions approved by this Court determined whether the policyholders' certificates could be amended to require continued payments after 20 years (*Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66 (1938)); or whether the policyholder could be required to pay increased assessments (*Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921); *Royal*

(Footnote continued on following page)

More recently, this Court reviewed a collateral attack on the class action judgment of an Indiana state court personally binding a nationwide class of insurance policyholders. *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Ass'n*, 455 U.S. 691 (1982). While the issue was not directly raised, this Court upheld the state court class action despite the fact that non-residents without minimum contacts were bound.

Like the state courts, the federal courts regularly conduct class actions with out-of-state class members without "minimum contacts" with the forum and this Court's state court class action holdings are the basis. In *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921), this Court rejected a collateral attack on a class action conducted in a federal district court. On review, this Court held that *Pennoyer* did not preclude a class action judgment binding on non-resident class members and that federal diversity jurisdiction had been properly exercised concluding that ". . . *a class suit of this nature might have been maintained in a state court and would have been binding on all of the class* . . ." Id. at 366 (emphasis added). 3B Moore's Federal Practice ¶ 23.11[5], at 232893. *See also Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

While Phillips tries to avoid the point, the logic of its assault on the state court class action would apply equally to the federal courts. The federal as well as the state

* *continued*
Arcanum v. Green, 237 U.S. 531 (1915)); whether insurance company management was liable and whether assessments were too high (*Hartford Ins. v. Barber*, 245 U.S. 146 (1917); *Hartford Ins. v. Ibs*, 237 U.S. 662 (1915)) and whether the trustee was liable for breach of trust (*Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950)). Nor would *in rem* jurisdiction have necessitated adequate representation as the Court required.

system is subject to due process. Although the Due Process Clause applicable to the federal system is found in the Fifth rather than the Fourteenth Amendment, there is no basis for different treatment with respect to the issues here. If a Kansas class action would unreasonably impose on the civil liberties of an Oklahoma citizen, by "haling" him before a Kansas court that citizen would be no less deprived if the adjudication were conducted by a federal court sitting in Kansas.*

In the many multi-state class actions which have come before it, this Court has never required that non-resident class members satisfy the test for personal jurisdiction in individual cases. And the long established practice of the lower courts, both state and federal, overwhelmingly demonstrate that normal jurisdictional principles do not apply. Surely the number of multi-state class actions conducted without applying principles of jurisdiction routinely applied in individual cases could not have been a mere oversight on the part of the courts.

B. The Minimum Contacts Test Urged By Phillips Would Prevent The States From Adjudicating Multi-State Problems Requiring Class Treatment And Destroy Procedures Essential To The States' Administration Of Justice.

Throughout the course of this century, multi-state class actions have been used to solve a variety of problems essential to the administration of the state system of

* Although Congress has authorized nationwide service of process in certain specific federal question cases, this has no bearing on the issue. The acts of the federal government like those of the states must comply with the requirements of due process. If the exercise of jurisdiction over non-resident class members did in fact infringe the rights of class members residing outside the forum the fact that it was authorized by Congress would not save it from being unconstitutional.

justice. These lawsuits have been initiated both by multi-state enterprises against multi-state classes and by multi-state classes against multi-state enterprises. The application of the "minimum contacts" test to absent class members would eliminate these multi-state class actions. Normally the absent class members have not come to a single forum to participate in the transaction giving rise to the lawsuit, but instead a multi-state enterprise comes to the various states of class member residence to conduct business. Thus, the entire class will not have "minimum contacts" with any one state and application of that test would require a multiplicity of piecemeal lawsuits.

An examination of some of the multi-state class action cases which have come before this Court will demonstrate the point. In the insurance industry (see, e.g., *Sovereign Camp of the Woodmen of the World v. William F. Bolin*, 305 U.S. 66 (1938); *Underwriters National Assurance Corp. v. North Carolina Life & Accident & Health Insurance Guaranty Ass'n*, 455 U.S. 691 (1982); *Carpenter v. Pacific Mutual Life Insurance Co.*, 10 Cal. 2d 307, 74 P. 2d 761 (1937), *aff'd sub nom. Neblett v. Carpenter*, 305 U.S. 297 (1938); *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531 (1915)) the nationwide policyholders purchase their policies from local agents and have no contact with one forum.* They would not expect to be "haled" before a foreign court and would not satisfy the

* Although Phillips and its Amici suggest that all of the class members have "minimum contacts" with Oklahoma (Phillips base of operation) and that an Oklahoma Court could therefore conduct the nationwide class action, this is incorrect. While Phillips is based in Oklahoma, Phillips maintains field agents for conducting leasing transactions and the royalty owners did not come to Oklahoma to negotiate the leases with Phillips. The contact of the Defendant Phillips with the forum does not satisfy any test requiring "minimum contacts" of the Plaintiffs with the forum.

"minimum contacts" test. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980). The same is true of the settlement of a trustee's account against non-resident trust beneficiaries. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Non-resident beneficiaries generally acquire their interest by the act of a grantor or testator, and they have no "minimum contacts" with one forum state. While these suits cause none of the problems hypothesized by Phillips, application of the "minimum contacts" test would prevent the conduct of national class actions such as these which this Court has upheld.*

While some multi-state enterprises like Phillips and its amici would hope to deprive absent class members of their day in court by the application of the "minimum contacts" test, the same test would impose an enormous burden on litigation initiated by them when they sought relief from a national class. If class actions are to be subject to territorial limitations where a multi-state class seeks relief from a multi-state enterprise, these limitations must also apply when a multi-state enterprise seeks relief from such a class. The result cannot depend on whether the relief

* In *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 271 N.W. 2d 879 (1978), a nationwide company was sued by a class of employees alleging breach of contract in connection with a pension program. The company unsuccessfully urged application of the "minimum contacts" test despite the fact that the case raised none of the problems hypothesized by Phillips. Application of that test would have required simultaneous class actions in at least 21 states. 271 N.W. 2d at 885. One must suspect that had the company sought relief from its employees it would not have urged application of the "minimum contacts" test. A review of other examples of multi-state class actions cited in Appendix A demonstrate that even though these cases cause none of the problems hypothesized by Phillips, they could not have been adjudicated under the "minimum contacts" test.

is sought by or against the enterprise. The "minimum contacts" test cannot be used to accomplish, and the Equal Protection Clause does not permit, such a result.

Destruction of the multi-state class action would cause enormous harm to the legitimate interests of the states and their courts. The state courts would be required to conduct fifty identical lawsuits to accomplish the kinds of adjudications which have always been completed in one court. Multiplying the number of lawsuits would place a staggering burden on the state system. The specter of fifty state court judges and counsel for the plaintiffs and defendants simultaneously conducting 50 fragments of the same litigation and 50 courts simultaneously conducting discovery with the same defendant is invoked in the name of due process. Obviously the states are simply not able to bear such a burden and the states would be prevented from resolving essential lawsuits; lawsuits which only the states can resolve; which can only be resolved by a multi-state class action and which this Court has consistently approved. In the judicial history of this country there is no instance of the state courts adjudicating multi-state disputes through the implementation of fifty class actions to resolve the same matter.

Even if the state court system could conduct fifty lawsuits to conclude one litigation, fragmenting the same suit would frustrate other significant state interests. The very purpose of class actions is to free the litigants from the conflicting adjudications of multiple lawsuits. See, e.g., Fed. R. Civ. P. 23(b)(1)(A); Advisory Committee Notes, Rule 23, 39 F.R.D. 73, 100-02 (1966); Ill. Rev. Stat. ch. 110 §57.2(4); Historical and Practice Notes, S.H.A. ch. 110 §57.2, at 135 (Supp. 1981). Requiring a multi-state enterprise to go through fifty adjudications would surely subject such an enterprise to conflicting standards of conduct.

Furthermore, the state which serves as a forum for non-resident claims is serving the interest of resident plaintiffs whose ability to get a day in court is dependent on the aggregation of claims of residents with those of non-residents. The burden of conducting fifty class suits is not one that could normally be borne by a major multi-state enterprise, let alone a class of small claimants lacking the concentration of economic power of such an enterprise. *See, e.g., Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980); *Hawaii v. Standard Oil of California*, 405 U.S. 251, 266 (1972). The "minimum contacts" test would defeat the ability to aggregate claims necessary to support such an adjudication.

Significantly Phillips has not asserted that similar limitations be placed on the federal courts' conduct of the multi-state class action. Phillips is suggesting, however, that this Court impose burdens on the state court system which would be unthinkable in the federal system where the federal courts have consistently conducted multi-state class actions without minimum contacts.

The ability of the federal courts to fully adjudicate one matter in one litigation has been given great importance, not only in class actions, but in individual actions as well. For example, in order to protect the state courts against the intrusion of federal courts in state matters, Article III of the Federal Constitution expressly imposes subject matter limitations on the federal courts. Despite this express prohibition, when a state issue arises out of the same matter as a federal cause of action, in the interest of having the entire matter completely adjudicated in one lawsuit, this Court has permitted the federal courts to adjudicate both the federal and state issues. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Osborne v. Bank of the United States*, 22 U.S. 737 (1824). It has been said that without this power "a court of original jurisdiction could not function". Wright, *Handbook of the Law of the Federal Courts* 72 (3rd ed. 1976); see also, Shenkier, *Ensuring Access To Federal Courts: A Revised Rationale For Pendent Jurisdiction*, 75 Nw. L. Rev. 245 (1981).

Although Phillips and its Amici attempt to argue that the interests of the states are opposed to multi-state class actions, no state has filed an amicus brief or otherwise opposed the conduct of the Shutts litigation as a national class action. In fact, when this issue was last brought to this Court, in *Miner v. Gillette*, the Attorneys General of Illinois, Wisconsin, Mississippi, Vermont, Tennessee, Florida, Arizona, and Texas, filed an amicus brief in support of the national class.

Furthermore, like the federal courts' Rule 23, the states have routinely passed class action statutes without territorial restrictions. See Appendix B. And the state courts have conducted many multi-state class actions. See Appendix A. No state has ever adopted legislation seeking to curtail non-resident class actions or impose any territorial limitation on them. The states' interests which Phillips seeks to raise are not the interests of the states, but solely the interests of a private party seeking to deprive others of their day in court.*

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* Phillips has ground much of its argument upon the need to protect the sovereign rights of sister states. Due process is not, however, a vehicle for the protection of such rights. Neither the express words nor the history of its enactment supports such a contention. *See* Redish, *Due Process, Federalism and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. L. Rev. 1112 (1981). And as this Court recently has said:

> The restriction on state power described in *Worldwide Volkswagen Corp.*, however, must be seen as ultimately the function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause, itself, makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign

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C. The Minimum Contacts Test Has No Application To Non-Resident Plaintiff Class Members And The Assertion Of Jurisdiction In The Absence Of Such Contacts Is Not A Deprivation Of Their Due Process Rights.

Under the pretext of "concern" for the due process rights of class members, Phillips and its Amici seek an unwarranted and unprecedented extension of the "minimum contacts" test to class actions. Far from protecting the rights of the non-resident class members, the imposition of the "minimum contacts" test would almost invariably deprive them of their day in court. This deprivation should not be justified on the pretext of protecting class members' due process rights.

The purpose of the "minimum contacts" test is the preservation of "individual liberties" by protecting a party from being "haled" before a court in a remote jurisdiction when such action is not justified by the party's reasonable expectation arising from its conduct. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694 (1982). This purpose has no application or relevance to class actions, and, significantly, neither the "minimum contacts" test nor any other test for individual jurisdiction has ever been applied or even suggested by this Court in any such collective action. The reason for this is that in an individual action, a party's presence is required, and, unlike a class action, no one stands in his stead. If a party does not appear, his interests will not be represented. Thus, in an individual action, under some circumstances, it may "offend traditional

* *continued*
power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the power of sovereignty . . . *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 703 n.10 (1982).

notions of fair play and substantial justice" to require an individual to appear in a remote forum.

But these circumstances simply do not obtain in class actions which, by definition, are conducted through class representatives. Absent class members are not themselves required or, in fact, permitted to appear or participate in the actions. Moreover, it makes no difference whether the absent class member resides within or without the forum state. The class members are not being "haled" before the court. Rather, their right to due process is protected by the class representative, obviating the need for their "minimum contacts" with the forum.

D. The Hypothetical Problems Suggested By Phillips And Its Amici Do Not Justify The Abolition Of The Multi-State Class Action Through The Imposition Of The Minimum Contacts Test.

Phillips and its supporting Amici have based their arguments against multi-state class actions on an apocalyptic vision of insoluble problems which they claim will arise if the "minimum contacts" test is not applied to future class actions. Their arguments are belied by over a century of successful multi-state class actions. If and when any such hypothetical problems arise, rather than eliminate the entire multi-state class action procedure, specific solutions should be employed.

1. Multi-State Class Actions Generally Do Not Require Application Of The Laws Of Numerous States And State Courts Are Not Incompetent Or Constitutionally Proscribed From Applying Such Laws When Required To Do So.

Phillips and its Amici argue that the Constitution requires that a state court in a multi-state class action must apply the laws of many foreign states and that such actions cannot proceed because of a state court's inability

to properly do so. However, it is not constitutionally necessary to apply the laws of multiple states in a class action. For example, while Phillips disputes the application of Kansas law to the entire class here, Phillips has conceded that the law of Oklahoma could be so applied. Surely the law of a state in which the Defendant is based could always be applied under the Constitution. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 306 (1981) and cases cited there. Furthermore, in the overwhelming majority of multi-state class actions it has not been necessary to apply the law of more than one state. (See the multi-state class actions upheld by this Court in Section A, *supra* and the cases cited in Appendix A hereto.) Modern choice of law rules give significant weight to the convenience of the court and the "simplification of the judicial task" is a significant consideration in the choice of law. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 306 (1981). The "grouping of contacts" approach used in *Oakes v. Chicago Fire Brick Co.*, 398 Ill. 474, 59 N.E. 2d 460 (1945) and *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 271 N.W. 2d 879 (1978), permits the application of the laws of one state to actions based on contracts, while the position of the Restatement (Second) of Conflicts of Law §945(2) permits the application of the law of one state to tort actions.

Furthermore, Phillips suggests that state courts are not competent to apply the laws of other states, notwithstanding the fact that federal courts in diversity cases constantly determine and apply the laws of the various states. This argument is totally inconsistent with the role of the state courts in an interdependent federal union, is wholly unwarranted, and is not one to which this Court should subscribe under principles of federalism. Furthermore, in individual actions state courts routinely apply the laws of other states and there is no constitutional basis for preventing state courts from doing so in collective litigation.

Phillips also theorizes that the Constitution requires the application of the law of each state of a class member's residence to that class member's claim, that under the Constitution those states have some new form of exclusive jurisdiction to determine matters arising under their laws, that the forum court cannot make decisions under the law of the class member's state and therefore cannot entertain any class action involving non-resident plaintiffs. This theory is simply at odds with established constitutional precepts. *See Allstate Insurance Co. v. Hague*, 449 U.S. 302, 306 (1981) regarding the construction of an insurance policy (which is subject to state regulation*) and cases cited there. *See also, Underwriters National Assurance Corp. v. North Carolina Life & Accident & Health Insurance Guaranty Ass'n*, 455 U.S. 691 (1982). No federal union could operate under such a principle; ours does not now, and it should not be required to do so in the future.

Furthermore, Phillips argument does not justify the application of the "minimum contacts" test to class actions. Requiring "minimum contacts" would have eliminated the non-resident class members in *Hartford v. Ibs* and *Mullane v. Central Hanover* for a few examples, even though the conduct of those cases contravened none of the choice of law policies urged by Phillips. (See also cases in Section A, *supra*, and in Appendix A.)

Moreover, the "minimum contacts" test would not prevent a forum court from adjudicating matters under the laws of the state of residence when the class members

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* Phillips and its Amici appear to base some of their arguments on their assertion that class actions are "regulatory". Insofar as all lawsuits and all rules of law regulate the conduct of citizens all of them are regulatory. And the use of the label "regulatory" is no justification for applying different constitutional choice of law principles here.

consented to participate in a forum court's adjudication. On the other hand, "minimum contacts" would prevent the adjudication of a multi-state class action even though constitutional conflicts principles did in fact permit application of the forum's own laws.*

Whether or not there could be circumstances justifying exclusive jurisdiction has no relevance here. At such time as this Court determines that exclusive jurisdiction is constitutionally required and a class action which would contravene this determination is before the Court, then, at that time, specific solutions should be imposed. This is no reason to destroy an essential procedure which has absolutely no relation to the hypothetical problems posed.

2. The Contention That Insoluble Conflicts Will Arise Between The States Is Belied By The Long History Of The National Class Action, And Could Not Form A Constitutional Basis For Its Destruction.

Phillips and its Amici argue that the national class action will result in insoluble conflicts between the states and that this justifies its destruction by the imposition of the "minimum contacts" test. It does not. National class actions, without territorial limitations, have been conducted in both state and federal courts since the beginning of this century. They have not generated insoluble conflicts, and no insoluble conflict has arisen with respect to the *Shutts* case itself. Nor do those who propose its

* Phillips and its Amici also argue that destruction of the national class action is necessary to eliminate forum shopping. Whenever the Constitution permits the choice of more than one law, all counsel will consider the impact of the forum on the choice of law in the case. There is no greater need, however, to go beyond normal constitutional choice of law principles in class actions, as Phillips argues, than there is in individual actions.

destruction suggest why the conflicts which may someday arise will be insoluble. Problems and conflicts are an inherent part of any legal system. In the federal system, there are conflicts among the circuits and within the circuits. In the state system there are conflicts among the courts of the sister states and among the courts within each state. If the mere existence of problems or conflicts justified the elimination of useful legal procedures, it is difficult to envision how our court systems could operate. Rather than eliminating an essential legal procedure, specific solutions are found on a case by case basis. Destroying the multi-state class action because of such potential conflicts would be to throw the "baby out with the bathwater".

It is suggested by Phillips and its Amici that non-resident class action judgments will not be honored by other states. However, this Court has regularly solved this supposed problem by requiring the sister states to give full faith and credit to national class action judgments. (*See Hartford Ins. v. Ibs, Hartford Ins. v. Barber,* and other cases cited in Section A *supra.*)

E. A State Court Which Is Conducting A Valid Class Action With Jurisdiction Over The Defendant Has The Greatest Interest In The Litigation And Is Not Prevented By The Constitution From Rendering A Complete Adjudication Including Non-Resident Class Members.

Phillips seems to suggest that if "minimum contacts" for the non-resident class members is not required, then this Court should still prevent the forum court from rendering a complete adjudication binding all class members unless the forum is the state with the greatest relationship to the activities giving rise to the suit. This

position has no basis in the Constitution of this country.* So long as the state court has jurisdiction over the defendant, it has the obligation to provide a complete determination. The absent class members' due process rights are not offended by and do not depend on the contact of the defendants or the underlying transaction with the forum. (See Section C *supra.*) The defendant's due process rights are fully protected if normal jurisdictional principles are applied to it. No greater contact or "nexus" is required by the Constitution.

Although this Court's decision must turn only on the requirements of the Constitution, Phillips' contention is also lacking in sound judicial policy. (See discussion in Section B *supra.*) This is borne out by the federal experience where, subject to normal rules of *forum non conveniens* and venue, the federal courts have found it essential to conduct nationwide class actions where the forum court has no superior relationship to the underlying transaction. *See, e.g., Appleton Electric v. Advance-United Expressways*, 494 F.2d 126 (7th Cir. 1974); *Philadelphia v. Morton Salt*, 248 F. Supp. 506 (E.D. Pa. 1965); *In re Antibiotic Antitrust Action*, 333 F. Supp. 299 (S.D.N.Y. 1971) *mandamus denied sub nom., Pfizer, Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1971); *Califano v. Yamasaki*, 442 U.S. 682 (1979). The Constitution imposes no greater impediments on the state system.

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* Phillips appears to be relying on the fact that in such cases as *Hartford Life Ins. Co. v. Ibs*, the insurers principal place of business was the forum state. However, in that case the reason this Court ruled that non-resident class members were bound was that, like the federal courts need for pendent jurisdiction, it was essential for the state courts to conduct a complete determination in one lawsuit. The fact that the state court was the defendant's principal place of business was not the basis of the court's ruling that it had jurisdiction over the plaintiff class members.

II.

THIS COURT SHOULD NOT ADDRESS THE REQUIREMENT OF NOTICE NECESSARY TO SATISFY DUE PROCESS IN MULTI-STATE CLASS ACTIONS.

This Court should not address the question of what notice is necessary to satisfy due process in multi-state class actions. Individual notice was provided in the trial court to all identifiable class members by first class mail at the outset of the lawsuit. This clearly satisfies any notice which might be thought to be required by due process. Therefore, any discussion of this Court stating that such notice is in fact a constitutional requirement would be *obiter dictum.* Furthermore this was not the issue upon which the Petition for Certiorari was granted, and has no relation to the issue of a multi-state class action. A class member's needs for and entitlement to notice would not depend on whether the class member lived within or without the forum state. Because this issue has not been addressed by the parties, was not an issue in the court below, has an insufficient factual basis in the record, and is of overwhelming importance to the future of collective adjudications, it is respectfully submitted that this Court should not attempt to articulate the due process requirements of notice in this case.

Because of the importance of the issue, and the uncertainty as to whether this Court will, in fact, address it, Amicus will briefly discuss notice. Because of its expense, (often in excess of $1.00 per class member) requiring individual mailed notice in large class actions at the outset of the litigation, would often terminate the litigation and deprive class members of a day in court. *See* Dam, "*Class Action Notice: Who Needs It?*", 1974 Sup. Ct. Rev. 97, 121-126; 7A C. Wright & A. Miller, *Federal Practice and Procedure*, §1786 (1972 & Supp. 1982).

Persons whose rights are determined are not always entitled to a hearing. Where determinations affect numerous similarly situated persons, "traditional notions of fair play" do not always require that every such individual be afforded a personal hearing. *Compare Bi-Metallic Co. v. Colorado*, 239 U.S. 441 (1915), *with Londonor v. Denver*, 210 U.S. 373 (1908). Class actions in particular are not intended to permit individual hearings but to provide aggregate adjudications based on proper representation. If the class is adequately represented, there is no constitutional requirement of individual hearings. *Hansberry v. Lee*, 311 U.S. 32 (1940). Where, however, representation is questionable, notice is constitutionally required but only to assure adequate representation. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950). The purpose of notice is to assure representation rather than to provide a personal day in court for each recipient.* 3B *Moore's Federal Practice*, Par. 23.72 at 23-486 & 23-487, (1978 & Supp. 1982). *See also*, Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 314 (1973).

If notice is required to assure adequate representation, the Constitution does not require pre-trial notice to be mailed to each identifiable class member, but only a sufficient number "likely to safeguard the interests of all".

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* In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the class was not represented by a similarly situated person, but by a public official with no stake in the outcome. Notice was not a practical impediment to the conduct of the action. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), is based on a statutory interpretation rather than the Constitution. 3B *Moore's Federal Practice* Par. 23.72 at 23-486 & 23-487 (1978 & Supp. 1982); 7A C. Wright and A. Miller, *Federal Practice and Procedure*, Civil §1786. In most of the class actions passed on by this Court class members have not received pre-trial notice. See cases cited in Section A, *supra*.

Mullane v. Central Hanover Bank & Trust, 339 U.S. at 319. Properly done publication or any procedure likely to reach a cross section of class members sufficient to elicit representation from varying elements complies with the Constitution when necessary to secure representation. Furthermore, if individual notice is to be given under a statute permitting opt out, it should be deferred until evidence has established who should bear the expense. If a defendant seeks individual pre-trial notice to all identifiable class members in order to obtain the protection of requiring the class members to exercise their option before a determination has been reached, then notice is for the protection of the defendant, and defendant should bear its cost. *See* Dam, "*Class Action Notice: Who Needs It?*", 1974 Sup. Ct. Rev. 97, 121-126. Requiring individually mailed pre-trial notice to all class members will simply deprive them of their day in court.

Notice is not only an important, but also a complex issue. *See* Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313 (1973). This is not a proper case for a determination regarding this issue. Amicus respectfully requests that this Court not address the issue of notice.

CONCLUSION

For the foregoing reasons and each of them, Amicus, the Consumer Coalition, respectfully requests that this Court deny the request of Phillips Petroleum Company to apply the "minimum contacts" test to state court class actions, and permit the state courts, along with the federal courts, to continue to conduct multi-state class actions.

Respectfully submitted,

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APPENDIX A

MULTI-STATE CLASS ACTIONS IN STATE COURTS

Vann v. *Hargett*, 22 N.C. 31 (1838).

Gibson v. *American Loan & Trust Co.*, 12 N.Y.S. 444 (1890).

Crane v. *Crane*, 105 S.W. 370 (Ct. App. Ky. 1907).

Guffanti v. *National Surety Co.*, 196 N.Y. 452, 90 N.E. 174 (Ct. App. 1909.)

National Surety Corp. v. *Nontz*, 262 Ky. 413, 90 S.W.2d 385 (1936).

Carpenter v. *Pacific Mutual Ins. Co.*, 10 Cal.2d 307, 74 P.2d 761 (1937), *aff'd sub nom.*, *Nebleti* v. *Carpenter*, 305 U.S. 297 (1938).

Taylor v. *Pacific Mutual Life Ins. Co.*, 214 N.C. 770, 200 S.E. 882 (1939).

Anglo-Continentale Trust Maatschappij v. *Allgemeine Elektricitaets-Gesellschaft*, 171 Misc 714, 13 N.Y.S.2d 397 (1939).

Larson v. *Pacific Mutual Ins. Co.*, 373 Ill. 614, 27 N.E.2d 458 (1940).

San Francisco v. *Market St. Ry. Co.*, 95 Cal.2d 248, 213 P.2d 780 (1950).

Kimbrough v. *Parker*, 344 Ill. App. 483, 101 N.E.2d 61 (1st Dist. 1951).

Moser v. *Keller*, 303 S.W.2d 135 (1957).

Chance v. *Superior Court of Los Angeles County*, 23 Cal. Rptr. 761, 373 P.2d 849 (S. Ct. Cal. 1962).

Cocke v. *Duke University*, 260 N.C. 1, 131 S.E.2d 909 (1963).

Holstein v. *Montgomery Ward & Co.*, CCH Pov. L. Rep. ¶9,052 (1968-71 Transfer Binder) at 10,783 (Illinois Circuit Court, 1969).

Metowski v. *Traid Corp.*, 28 Cal. App.3d 332, 104 Cal. Rptr. 599 (1972).

Paley v. *Coca-Cola Co.*, 389 Mich. 983, 209 N.W.2d 232 (1973).

Horst v. *Guy*, 211 N.W.2d 723 (S. Ct. N.D. 1973).

Cooper v. *American Savings & Loan Assn.*, 127 Cal. Rptr. 579, 55 Cal. App.3d 274 (1976).

Shutts v. *Phillips Petroleum Co.*, 567 P.2d 1292 (S. Ct. Kan. 1977).

Van Vactor v. *Blue Cross Assoc.*, 50 Ill. App.3d 709, 365 N.E.2d 638 (1977).

Steinberg v. *Chicago Medical School*, 69 Ill.2d 320, 371 N.E.2d 634 (1977).

Nix v. *Northern Gas Producing Co.*, 222 Kan. 739, 567 P.2d 1322 (S. Ct. Kan. 1977).

Maddox v. *Gulf Oil Co.*, 222 Kan. 733, 567 P.2d 1326 (S. Ct. Kan. 1977).

Sterling v. *Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325 (S. Ct. Kan. 1977).

Frank v. *Teachers Insurance & Annuity Assoc.*, 71 Ill.2d 583, 376 N.E.2d 1377 (1978).

Schlosser v. *Allis-Chalmers Corp.*, 86 Wis.2d 226, 271 N.W.2d 879 (1978).

Gray v. *Amoco Production Co.*, 573 P.2d 1080 (S. Ct. Kan. 1978).

Sterling v. *Marathon Oil Co.*, 223 Kan. 686, 576 P.2d 635 (S. Ct. Kan. 1978).

Hoover v. *May Dept. Stores Co.*, 62 Ill.App.3d 106, 378 N.E.2d 762 (1978), *rev'd and remanded on other grds*, 77 Ill.2d 93, 395 N.E.2d 541 (1979).

Stern v. *Carter*, 97 Misc. 2d 775, 412 N.Y.S.2d 333 (S. Ct. Kings Cty, 1979).

Mercury Records Productions, Inc. v. *Economic Consultants, Inc.*, 91 Wis.2d 482, 283 N.W.2d 613 (1979).

Geelan v. *Pan American World Airways*, 441 N.Y.S. 474, 83 A.D.2d 538 (1980).

Clark v. *Harris*, 76 Ind. Dec. 767, 406 N.E.2d 646 (1980).

MULTI-STATE CLASS ACTIONS IN FEDERAL COURTS

Smith v. *Swormstedt*, 57 U.S. (16 How.) 288 (1853).

Supreme Tribe of Ben Hur v. *Cauble*, 255 U.S. 356 (1921).

Smith v. *Board of Pensions of the Methodist Church, Inc.*, 54 F. Supp. 224 (E.D. Mo. 1944).

Advertising Specialty National Association v. *Federal Trade Commission*, 238 F.2d 108 (1st Cir. 1956).

Calagaz v. *Calhoon*, 309 F.2d 248 (5th Cir. 1962).

Philadelphia Electric Company v. *Anaconda American Brass Co.*, 43 F.R.D. 452 (E.D. Pa. 1968).

State of West Virginia v. *Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir. 1971).

Siegel v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971).

Research Corp. v. *Edward J. Funk & Sons, Co., Inc.*, 15 F.R.Serv. 2d 580 (N.D. Ind. 1971).

In re Antibiotic Antitrust Actions, 333 F.Supp. 299 (S.D. N.Y. 1971) *Mandamus denied sub nom., Pfizer, Inc.* v. *Lord*, 447 F.2d 122 (2d Cir. 1971).

Rivera v. *Chicken Delight, Inc.*, 17 F.R.Serv. 2d 473 (S.D. Tex. 1973).

Theriault v. *Carlson*, 353 F.Supp. 1061 (N.D. Ga. 1973).

Coburn v. *4-R Corp.*, 77 F.R.D. 43 (E.D. Ky., 1977).

Aznavorian v. *Califano*, 440 F.Supp. 788 (S.D. Cal. 1977), *rev'd on other grds.*, 439 U.S. 107 (1978).

In Re: Gap Stores Securities Litigation, 79 F.R.D. 283 (N.D. Cal. 1978).

In Re: "Agent Orange" Products Liability Litigation, 506 F.Supp. 762 (E.D. N.Y.), *rev'd on other grds*, 635 F.2d 987 (2d Cir. 1980).

United States v. *Will*, 449 U.S. 200 (1980).

McClure v. *Harris*, 503 F.Supp. 409 (N.D. Cal. 1980).

APPENDIX B

STATE CLASS ACTION STATUTES

Alabama:	Ala. R. Civ. P. 23.
Alaska:	Alaska R. Civ. P. 23.
Arizona:	Ariz. R. Civ. P. 23.
Arkansas:	Ark. R. Civ. P. 23-23.2.
California:	Cal. Code. Civ. Pro. §382.
Colorado:	Colo. R. Civ. P. 23.
Connecticut:	Ct. Gen. Stat. §52-104-105.
Delaware:	Del. Ch. R. 23.
District of Columbia:	D.C. R. Civ. P. 23-23-I.
Florida:	Fla. R. Civ. P. 1.220.
Georgia:	Ga. Code §81A-123.
Hawaii:	Hawaii R. Civ. P. 23.
Idaho:	Idaho R. Civ. P. 23.
Illinois:	Ill. Rev. Stat. Ch. 110 §57.2-7.
Indiana:	Ind. R. Tr. P. 23.
Iowa:	Iowa R. Civ. P. 42.
Kansas:	Kan. Stat. §60-223.
Kentucky:	Ky. R. Civ. P. 23.
Louisiana:	La. Code Civ. Pro. Art. 591.
Maine:	Me. R. Civ. P. 23.
Maryland:	Md. Code Rule 209.
Massachusetts:	Mass. R. Civ. P. 23.

Michigan:	Mi. Stat. Gen. Ct. Rule 208.
Minnesota:	Minn. R. Civ. P. 23.
Missouri:	Mo. Rev. Stat. §507.070.
Montana:	Mont. R. Civ. P. 23.
Nebraska:	Neb. Rev. Stat. §25-319.
Nevada:	Nev. R. Civ. P. 23.
New Hampshire:	Common Law
New Jersey:	N.J. Civ. Prac. Rule 4:32.
New Mexico:	N.M. Stat. §21-1-1, §21-6-1.
New York:	N.Y. Civ. Prac. Law §901-909.
North Carolina:	N.C. Gen. Stat. §1A-1 R. Civ. P. 23.
North Dakota:	N.D. R. Civ. P. 23.
Ohio:	Ohio R. Civ. P. 23.
Oklahoma:	12 OK Stat. Ann. §13-18.
Oregon:	Or. Rev. Stat. §§13.210-.410.
Pennsylvania:	Pa. Rule Civ. P. 1701-1716.
Rhode Island:	RI. R. Civ. P. 23.
South Carolina:	South Carolina Code §10-204.
Tennessee:	Tenn. R. Civ. P. 23.
Texas:	Tex. R. Civ. P. 42.
Utah:	Utah R. Civ. P. 23.
Vermont:	Vt. R. Civ. P. 23.
Washington:	Wash. Ct. Rules, Rule 23.
West Virginia:	W.V. R. Civ. P. 23.
Wisconsin:	Wis. Stat. §260.12.
Wyoming:	Wyo. R. Civ. P. 23.